Supreme Court, U.S.
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No. 09-920

In The Supreme Court of the United States

PAUL SIMMONS, PEDRO VALENTIN, DENNIS BELDOTTI,

Petitioners,

v.

WILLIAM FRANCIS GALVIN, in his capacity as Secretary of the Commonwealth of Massachusetts,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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Question Presented.

In November 2000, the voters of Massachusetts amended the state Constitution to disqualify incarcerated felons from voting in state elections where qualifications are set directly by the Massachusetts Constitution, by revising the provision that already disqualified minors under the age of eighteen years, persons under guardianship, and persons convicted of corrupt election practices. Pet. App. 1a-2a, 5a-6a. A year later, the Massachusetts Legislature enacted a similar amendment to the parallel statute that establishes voting qualifications for all elections in the Commonwealth of Massachusetts. *Id.* Petitioners make no claim that these laws were passed or enacted with racially discriminatory intent or purpose. Pet. App. 9a.

The questions presented are:

1. Should the dismissal of Petitioners' claim under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, be affirmed either (a) because VRA § 2 does not apply to felon disenfranchisement laws, or at least does not apply to such laws that are adopted without racial animus, or (b) on the alternative ground that Petitioners' complaint fails to allege facts plausibly suggesting that Petitioners were denied the right to vote on account of race or color rather than on account of being an incarcerated felon?

2. Did the court of appeals correctly apply the long-settled rule of law that civil, regulatory measures that are not punitive in purpose or effect do not implicate the Ex Post Facto Clause of the United States Constitution?

Table of Contents.

Page

Question Presented. i

Table of Authorities. iv

Statement of the Case. 1

(1) Incarcerated Felons May Not Vote in Massachusetts and 47 Other States. 1

(2) Petitioners' Claims of Disparate Impact 2

(3) The Court of Appeals Dismissed the Voting Rights Act Claim 3

(4) The Court of Appeals Affirmed Judgment Against the Ex Post Facto Claim. 8

Reasons for Denying the Petition. 9

I. No Review of the Voting Rights Act Claim Is Warranted. 9

A. The Ninth Circuit May Join the Growing Consensus that 42 U.S.C. § 1973 Does Not Apply to Laws that Disqualify Felons From Voting 9

B. Certiorari Review Is Inappropriate Because Petitioners Failed to Allege Facts Plausibly Suggesting a Claim ... 12

C. The Decision Below Is Consistent with the Rules for Construing Laws Enacted Under Congress's Enforcement Powers. 16

Page

1. The Clear Statement Rule..... 17

a. Section 2 of the Voting Rights Act Is Ambiguous..... 19

b. Applying VRA § 2 Here Would Shift the Constitutional Balance..... 21

c. Congress Provided No Clear Statement That the Voting Rights Act Was Intended to Restrict the Power of States to Disenfranchise Felons..... 24

2. The Canon of Constitutional Avoidance Applies Because Congress Made No Findings of a Pattern of Unconstitutional Felon Disenfranchisement..... 26

II. No Review of the Ex Post Facto Claim Is Warranted..... 31

Conclusion..... 35

Table of Authorities.

Cases **Page**

Baker v. Pataki,
85 F.3d 919 (2nd Cir. 1996) 19

Bank of Am. Nat'l Trust & Savings Assoc. v. 203 North LaSalle St. Partnership,
526 U.S. 434 (1999) 21

Bell Atlantic v. Twombly,
127 S.Ct. 1955 (2007) 13

Bernal v. Fainter,
467 U.S. 216 (1984) 22

Board of Trustees of Univ. of Ala. v. Garrett,
531 U.S. 356 (2001) 27

Chisom v. Roemer,
501 U.S. 380 (1991) 18, 21

City of Boerne v. Flores,
521 U.S. 507 (1997) 28

City of Mobile v. Bolden,
446 U.S. 55 (1980) 6, 23

Clark v. Martinez,
543 U.S. 371 (2005) 27

Dura Pharmaceuticals v. Broudo,
544 U.S. 336 (2005) 15

Farrakhan v. Washington,
338 F.3d 1009 (9th Cir. 2003) 10, 11

Page

Farrakhan v. Washington,
359 F.3d 1116 (9th Cir. 2004)
(Kozinski, J., et al., dissenting from
denial of *en banc* review) 11, 15, 26, 28

Farrakhan v. Gregoire,
2006 WL 1889273 (D. Wash. 2006),
rev'd, 590 F.3d 989 (9th Cir. Jan. 5, 2010),
petition for en banc review filed,
No. 06-35669 (March 5, 2010)..... 10n, 11

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,
527 U.S. 627 (1999)..... 27

Goosby v. Town Bd. of Town of Hempstead, N.Y.,
180 F.3d 476 (2nd Cir. 1999) 21

Gray v. Sanders,
372 U.S. 368 (1963)..... 23

Gregory v. Ashcroft,
501 U.S. 452 (1991)..... 22, 24

Hayden v. Pataki,
449 F.3d 305 (2nd Cir. 2006) (en banc) ..... passim

Hudson v. United States,
522 U.S. 93 (1997)..... 32

Hunter v. Underwood,
471 U.S. 222 (1985)..... 4, 16, 23

Irby v. Virginia State Bd. of Elections,
889 F.2d 1352 (4th Cir. 1989)..... 14

Page

Johnson v. Governor of the State of Florida,
405 F.3d 1214 (11th Cir.) (en banc), cert. denied sub nom. *Johnson v. Bush*,
546 U.S. 1015 (2005) ..... passim

Jones v. United States,
529 U.S. 848 (2000) 26

Jones v. Yursa,
2008 WL 4997604 (D. Idaho 2008) 14

Kansas v. Hendricks,
521 U.S. 346 (1997) 33

Kennedy v. Mendoza-Martinez,
372 U.S. 144 (1963) 32, 34

Laro v. New Hampshire,
259 F.3d 1 (1st Cir. 2001) 27n

Lassiter v. Northampton Elec. Bd.,
360 U.S. 45 (1959) 22

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 21

Miller v. Johnson,
515 U.S. 900 (1995) 27

National Ass'n for Advancement of Colored People v. New York,
413 U.S. 345 (1973) 17

Northwest Austin Mun. Utility Dist. No. One v. Holder, 129 S.Ct. 2504 (2009) 19, 22, 27

Page

O'Gilvie v. United States,
519 U.S. 79 (1996) 20

Oregon v. Mitchell,
400 U.S. 112 (1970) 22, 28, 29, 30

Ortiz v. City of Philadelphia Office of the City Comm'rs, 28 F.3d 306 (3d Cir. 1994) 14

Osburn v. Cox,
369 F.3d 1283 (11th Cir.), *cert. denied*, 543 U.S. 943 (2004) 13

Pennsylvania Dept. of Corrections v. Yeskey,
524 U.S. 206 (1998) 20

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 19

Richardson v. Ramirez,
418 U.S. 24 (1974) 4, 23, 25

Romer v. Evans,
517 U.S. 620 (1996) 22

Salas v. Southwest Texas Junior Coll. Dist.,
964 F.2d 1542 (5th Cir. 1992) 14

Selective Service System v. Minnesota Public Interest Research Group,
468 U.S. 841 (1984) 34

Simmons v. Galvin,
575 F.3d 24 (1st Cir. 2009), *petition for cert. filed*, No. 09-920 (February 1, 2010)..... passim

Page

Smith v. Boyle,
144 F.3d 1060 (7th Cir. 1988) 21

Smith v. Doe,
538 U.S. 84 (2003) 31, 32, 33

Smith v. Salt River Project Agricultural Improvement and Power District,
109 F.3d 586 (9th Cir. 1997) 13, 14

United States ex rel. Attorney General v. Delaware & Hudson Co.,
213 U.S. 366 (1909) 27

United States v. Johnston,
268 U.S. 220 (1925) 35

United States v. Mississippi,
380 U.S. 128 (1965) 17

United States v. One Assortment of 89 Firearms,
465 U.S. 354 (1984) 33

United States v. Shabani,
513 U.S. 10 (1994) 19

United States v. Ward,
448 U.S. 242 (1980) 31, 32, 33

Webster v. Fall,
266 U.S. 507 (1925) 19

Wesley v. Collins,
791 F.2d 1255 (6th Cir. 1986) 13, 14

Page

White v. Regester,
412 U.S. 755 (1973) 7

Statutes

28 U.S.C. § 1292(b) 4

42 U.S.C. § 1973 ..... passim

42 U.S.C. § 1973gg-6(a)(3)(B) 7

42 U.S.C. § 1973gg-6(g)(3) 7

Mass. Gen. L. c. 51, § 1 1

Constitutional Provisions

Mass. Const. amend. art. 3 1

U.S. Const. Art. I, § 10 3

U.S. Const., Art. IV, § 4 22

Rules

Fed. R. Civ. P. 8(a)(2) 13, 15

Sup. Ct. R. 10 35

Statement of the Case.

(1) Incarcerated Felons May Not Vote in Massachusetts and 47 Other States.

In 2000 and 2001, the Commonwealth of Massachusetts joined 47 other states in barring incarcerated felons from voting; only Maine and Vermont do not. Pet. 6; Pet. App. 1a-2a; 13a. Unlike in many other states, a felon who has been released from prison is no longer disqualified from voting in Massachusetts. Pet. App. 6a, 11a.

Previously, the Massachusetts Constitution disqualified minors under the age of eighteen years, persons under guardianship, and persons convicted of corrupt election practices from voting in elections for Governor, Lieutenant Governor, and State Senators or Representatives. *Id.*; Mass. Const. amend. art. 3. A Massachusetts statute established the same disqualifications for all other elections for national, state, or local officials. *See* Mass. Gen. L. c. 51, § 1.

In November 2000, the voters amended this constitutional provision to add incarcerated felons to the list of persons disqualified from voting. Pet. App. 6a. This amendment was approved by a vote of 60.3 percent voting "yes" to 33.9 percent voting "no." *Id.* 5a. In 2001, the Legislature enacted a similar amendment to the voting qualification statute. *Id.* 6a. These laws were passed after Massachusetts prisoners formed a political action committee and "attempted to organized to change the laws under which they were convicted, sentenced, and imprisoned." Pet. App. 19a; *accord id.* 3a.

(2) Petitioners' Claims of Disparate Impact.

Petitioners claimed that these Massachusetts felon disenfranchisement laws violate VRA § 2 "because the percentage of imprisoned felons who are Hispanic or African-American is higher than the percentages of those groups in the population of the state...." Pet. App. 2a. "This is a claim based purely on the allegation that" these laws have "a disparate impact on minorities by disqualifying from voting imprisoned felons." *Id.* 9a.

Petitioners "made no allegation that the Commonwealth acted with racially discriminatory intent or purpose" in enacting its felon disenfranchisement laws, and "specifically disavowed any such claim." Pet. App. 9a. Indeed, there is no claim that Massachusetts has any history of using laws, rules, practices, tests, or devices to restrict, impede, or discourage voting by racial minorities. *Id.* 9a, 19a-20a. "Nor is there any claim that Massachusetts has defined ... disenfranchisement in terms of felonies that have higher conviction rates for minorities than for whites." *Id.* 20a.

Petitioners' complaint alleges that the Massachusetts felon disenfranchisement laws have a "disproportionately adverse effect on the voting rights of African-Americans and Hispanic Americans compared to [their] effect on the voting rights of other citizens." Pet. App. 7a. Petitioners further allege that this effect "is caused by, among other things, the facts that African-Americans and Hispanic-Americans are over-represented in the population of Massachusetts incarcerated felons, and that there exists considerable racial and ethnic bias,

both direct and subtle, in the Massachusetts court system." *Id.* Finally, they allege that these voting qualification laws "each interact with social and historical conditions to cause an inequality in the opportunities enjoyed by minority and non-minority voters to elect their preferred representatives." *Id.*

The complaint refers to and incorporates the final report of the Commission to Study Racial and Ethnic Bias in the [Massachusetts] Courts, which was issued in September 1994. Pet. App. 9a. "The report did not conclude that any race bias resulted in minority defendants being sentenced as felons," however. Pet. App. 10a n.3. The complaint refers to Commission findings regarding the under-representation of racial minorities in jury pools, a lack of qualified interpreters, and the under-representation of minorities on the Massachusetts bench and in the Massachusetts bar. *Id.* 9a-10a n.3. The Commission tried to test the hypothesis that racial and ethnic bias may influence sentencing decisions by judges, but it could not do so because the necessary data were unavailable. *Id.*

(3) The Court of Appeals Dismissed the Voting Rights Act Claim.

This action was commenced *pro se* in August 2001; counsel for plaintiffs was appointed in July 2002. Pet. 8. The original complaint was amended twice by counsel. Pet. App. 7a. Petitioners claimed that the Massachusetts felon disenfranchisement laws violate VRA § 2, the Ex Post Facto Clause of U.S. Const. Art. I, § 10, and the Equal Protection Clause in the Fourteenth Amendment to the Constitution. Pet. 8-9 & n.4; Pet. App. 11a.

In August 2007, the district court granted Respondent's motion for summary judgment on the ex post facto and equal protection claims, and denied Respondent's motion for judgment on the pleadings on the VRA claim. Pet. App. 11a. The court of appeals granted leave to appeal all three claims under 28 U.S.C. § 1292(b). *Id.* Petitioners waived their equal protection claim by not appealing the district court order dismissing it. *Id.*

The court of appeals reversed with respect to the VRA claim, and ordered that the claim be dismissed. Pet. App. 3a, 13a-41a. It explained that "[w]e think it clear from the language, history, and context of the VRA that Congress never intended § 2 to prohibit the states from disenfranchising currently incarcerated felons." *Id.* 3a.

The court began by discussing the constitutional background. *Id.* 15a-20a. It noted that "[t]he power of the states to disqualify from voting those convicted of crimes is explicitly set forth in § 2 of the Fourteenth Amendment." *Id.* 15a-16a (citing *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974)). It observed that felon disenfranchisement laws are constitutional unless adopted with racially discriminatory intent, but stressed that "plaintiffs make no allegation of intentional discrimination, and on appeal they allege no constitutional violation other than the Ex Post Facto claim." *Id.* 17a (citing *Hunter v. Underwood*, 471 U.S. 222, 229 (1985)).

The court of appeals then analyzed the text of VRA § 2, codified at 42 U.S.C. § 1973. Pet. App. 20a-23a. It observed that, "under the plain terms of the statute, not every 'voter qualification is actionable

under § 2." *Id.* 21a. Only qualifications that "result[] in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" are barred by the state. *Id.* (quoting 42 U.S.C. § 1973(a)).[1] The court found that:

> [I]t is neither plain nor clear that the plaintiffs' claim fits within the text of § 2(a). For example, it is logical to understand the state law disenfranchisement of incarcerated felons as not 'resulting' in a denial 'on account of race or color' but on account of imprisonment for a felony, and thus not within the text of § 2 at all.

Pet. App. 23a.

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[1] In 1982, Congress amended VRA § 2 to read as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973b(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

96 Stat. 134, 42 U.S.C. § 1973.

The court concluded that "the language of § 2 (a) is both broad and ambiguous and that judicial interpretation of a claim under the VRA may not be limited to the text of § 2(a) alone." *Id.* It observed that "[t]he Supreme Court itself, in deciding § 2 cases[,] has never resorted to plain text alone to give § 2 meaning," but instead "has commonly used legislative history." *Id.* 24a.

The court of appeals "look[ed] at the terms of the original VRA as a whole, the context, and recognized sources of congressional intent," and found "it is clear the original § 2 of the VRA of 1965 was not meant to create a cause of action against a state which disenfranchises its incarcerated felons." *Id.* 25a. Both the House and the Senate made clear their understanding that the 1965 version of VRA § 4, which bars the use of facially neutral tests or devices "with the effect of denying or abridging the right to vote on account of race or color," would not proscribe state laws that disqualify felons from voting. *Id.* 27a-28a. The court of appeals found that "the express history" reflects Congress's intent that the Voting Rights Act as a whole not apply to felon disenfranchisement laws. *Id.* 28a-29a.

It further found that the 1982 amendments to VRA § 2 "did not alter the prior understanding that the VRA did not reach the disenfranchisement of currently incarcerated felons." Pet. App. 33a. "Congress's specific purpose in amending § 2 of the VRA was to overrule certain aspects of the Supreme Court's decision in *Bolden*, which was concerned with vote dilution claims, not direct denial claims." *Id.* 34a (discussing *City of Mobile v. Bolden*, 446 U.S. 55 (1980)). In particular, "Congress aimed to reinstate

the 'results test,' which had been the rule developed in the pre-*Bolden* case law for vote dilution claims under *White*." *Id.* 35a (discussing *White v. Regester*, 412 U.S. 755 (1973)). "Nothing in the text, context, or history supports [Petitioners'] position" that VRA § 2 applies to "the disenfranchisement of currently incarcerated felons." *Id.* 33a.

Finally, the court observed that since 1982 Congress has enacted several laws that allow or direct states to remove disenfranchised felons from voter rolls. Pet. App. 37a-38a (discussing the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-6(a)(3)(B), which authorizes states to purge disenfranchised felons from voter rolls, and the Help America Vote Act of 2002, 42 U.S.C. § 1973gg-6(g)(3), which directs States to purge disenfranchised felons from voting lists for federal elections). It found that these more recent enactments are inconsistent with reading VRA § 2 to create a cause of action against the Massachusetts felon disenfranchisement laws. *Id.* 38a.

The court of appeals did not "reach the serious constitutional questions which the Commonwealth argues would be raised were we to adopt plaintiffs' construction of the statute." Pet. App. 41a. Respondent argued below that VRA § 2 must be construed as not applying to felon disenfranchisement laws that were enacted without racial animus because: (i) that result is required by the clear statement rule, since VRA § 2 is ambiguous and applying it to felon disenfranchisement laws that were enacted without racial animus would shift the constitutional balance between the States and the federal government; and (ii) that result is also

required to avoid constitutional doubt created by the absence of any congressional findings that States engaged in a pattern of disenfranchising felons in a deliberate attempt to discriminate on the basis of race or color.

Nor did the court of appeals resolve Respondent's alternative argument that Petitioners' complaint alleges no facts plausibly suggesting the Commonwealth has violated VRA § 2. Pet. App. 39a-40a. However, the court did express serious doubt as to whether Petitioners' had stated a viable VRA claim, even assuming that the statute could apply to felon disenfranchisement laws. *Id.* n.23.

(4) The Court of Appeals Affirmed Judgment Against the Ex Post Facto Claim.

With respect to Petitioners' claim under the Ex Post Facto Clause, the court of appeals affirmed the grant of summary judgment in favor of the Respondent. Pet. App. 42a-48a. It applied well-settled precedent from this Court that "[o]nly a punitive measure can violate the Ex Post Facto Clause," and that civil, regulatory measures that are not punitive in nature cannot. *Id.* 42a-43. The court of appeals then found, based on the undisputed facts, that the Massachusetts laws that disqualify incarcerated felons—which appear "not in the Commonwealth's criminal code, but rather its civil constitutional and statutory voter qualification provisions," *Id.* 44a—are civil, regulatory measures, and are not punitive in nature. *Id.* 43a-48a.

Reasons for Denying the Petition.

Further review of the first question, regarding Petitioners' claim under the Voting Rights Act, is not warranted for several reasons. First, the circuit split identified by Petitioners may soon disappear, if the Ninth Circuit grants *en banc* review in a pending action and joins with the First, Second, and Eleventh Circuits in holding that 42 U.S.C. § 1973 does not apply to felon disenfranchisement laws. Second, in any case, Petitioners failed to allege facts plausibly suggesting that the challenged Massachusetts laws violate VRA § 2. Third, the court of appeals' decision in this case is consistent with this Court's precedent regarding application of the clear statement rule and the canon of constitutional avoidance to laws enacted by Congress pursuant to its enforcement powers under the Fourteenth and Fifteenth Amendments.

Nor should the Court grant certiorari review of the second question, regarding Petitioners' claim under the Ex Post Facto clause. The decision below is consistent with the Court's well-established standard for determining whether a law is a punitive measure, and does not raise any important but unresolved federal question.

I. No Review of the Voting Rights Act Claim Is Warranted.

A. The Ninth Circuit May Join the Growing Consensus that 42 U.S.C. § 1973 Does Not Apply to Laws that Disqualify Felons From Voting.

The circuit conflict that is the main focus of the petition, *cf.* Pet. 10-11, does not warrant this Court's

review. There is an emerging consensus among the circuits that VRA § 2 does not apply to state laws that disqualify incarcerated felons from voting. Pet. App. 13a-14a. The First, Second, and Eleventh Circuits have all so held. *Id.*; *Simmons v. Galvin*, 575 F.3d 24, 30-42 (1st Cir. 2009), *petition for cert. filed*, No. 09-920 (February 1, 2010); *Hayden v. Pataki*, 449 F.3d 305, 312-329 (2nd Cir. 2006) (en banc); *Johnson v. Governor of the State of Florida*, 405 F.3d 1214, 1227-1235 (11th Cir.) (en banc), *cert. denied sub nom. Johnson v. Bush*, 546 U.S. 1015 (2005) (holding that VRA § 2 does not apply to state laws that disqualify incarcerated felons and continue to disenfranchise felons after release from prison). Only the Ninth Circuit has disagreed. Pet. 10-11. In 2003, a three-judge panel held that the VRA applies to state felon disenfranchisement laws. *Farrakhan v. Washington*, 338 F.3d 1009, 1010-20 (9th Cir. 2003) ("*Farrakhan I*").[2] Seven judges dissented from the denial of *en banc* review, and opined that the full court should have held that plaintiffs failed to state a claim under the VRA. *Farrakhan v. Washington*,

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[2] On remand, the district court granted summary judgment for the defendant after finding "that the totality of the circumstances does not support a finding that Washington's felon disenfranchisement law results in discrimination in its electoral process on account of race." *Farrakhan v. Gregoire*, 2006 WL 1889273, *9 (D. Wash. 2006), *rev'd*, 590 F.3d 989 (9th Cir. Jan. 5, 2010) ("*Farrakhan II*"), *petition for en banc review filed*, No. 06-35669 (March 5, 2010). The Ninth Circuit reversed, and ordered that summary judgment be granted for the plaintiffs. *Farrakhan II*, 509 F.3d at 1015. The panel held that (1) it was bound by *Farrakhan I*, and (2) the undisputed facts demonstrated that "racial minorities are over-represented in the felon population based upon factors that cannot be explained by non-racial reasons." *Id.* at 999-1000, 1015.

359 F.3d 1116, 1117-19 (9th Cir. 2004) (Kozinski, J., et al., dissenting from denial of *en banc* review).

This circuit split may soon disappear, however. The Ninth Circuit is considering whether to grant *en banc* review of the decision after remand in *Farrakhan II*, which would provide an opportunity to reconsider *Farrakhan I*. In an unusual order, the Ninth Circuit *sua sponte* directed the parties to "file concurrent briefs setting forth their respective positions on whether this case should be, or should not be, reheard en banc." *See* No. 06-35669, Order dated February 12, 2010. The State of Washington, in a brief filed on March 5, 2010, requested en banc review, in part because the conflicting decisions in *Simmons*, *Hayden*, and *Johnson* call into question whether *Farrakhan I* was correctly decided. If the Ninth Circuit were to grant en banc review in *Farrakhan II*, its subsequent decision could eliminate the circuit split that forms the main basis for the petition for a writ of certiorari in this case.

Moreover, *Farrakhan* has not had significant consequences so far. It appears that no court outside the Ninth Circuit has allowed a Voting Rights Act challenge to a felon disenfranchisement law to proceed, other than the district courts whose orders were on appeal in *Simmons*, *Hayden*, and *Johnson*. Even within the Ninth Circuit, only one other case has applied the *Farrakhan I* holding that a felon disenfranchisement law may be challenged under VRA § 2, and that action was dismissed on other grounds. *See Jones v. Yursa*, 2008 WL 4997604, *3-*4 (D. Idaho 2008) (while recognizing that "the Ninth Circuit has been willing to apply the VRA where felon disenfranchisement has been challenged,"

district court dismissed claim that Idaho law disqualifying felons from voting violates VRA § 2 because plaintiff did not allege that he is a member of a racial minority, and "also failed to point to any specific evidence that would support his allegation that Idaho's alternative sentencing scheme works to deny the right to vote based on race").

While it is possible that the issue presented in the first question may call for this Court's review at some later date in another case, review at this time would be premature.

B. Certiorari Review Is Inappropriate Because Petitioners Failed to Allege Facts Plausibly Suggesting a Claim.

Even if the question whether VRA § 2 applies to felon disenfranchisement laws otherwise warranted review, this case would be a poor vehicle for considering it, because the judgment of the court of appeals could be affirmed on an alternative ground. Petitioners' second amended complaint failed to allege facts plausibly suggesting that the Massachusetts voter qualification laws denied Petitioners the right to vote on account of race or color, rather than on account of the fact that they pleaded guilty to or were found guilty of committing one or more felonies and are still serving the resulting prison sentences. Pet. App. 39a-40a n.23. And "[t]his is the situation eight years after [plaintiffs] filed suit and have had discovery from defendants." Pet. App. 39a n.23.

Given the lack of any factual allegation plausibly suggesting that the challenged Massachusetts laws

interacted with racial bias in the community to disqualify voters on account of race or color, Petitioners' complaint failed to state a viable claim under VRA § 2. *See Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir.), *cert. denied*, 543 U.S. 943 (2004) (affirming dismissal of VRA § 2 claim against Georgia's open primary system on this ground). Petitioners have the burden at the pleading stage to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic v. Twombly*, 127 S.Ct. 1955, 1974 (2007). Federal R. Civ. P. 8(a)(2) "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964.

Petitioners' allegation that the Massachusetts felon disenfranchisement laws have a "disproportionately adverse effect" on African-American and Hispanic-American voters, Pet. App. 7a, would not state a claim upon which relief may be granted even if the VRA applied to such laws. *See Wesley v. Collins*, 791 F.2d 1255, 1260-1262 (6th Cir. 1986) (affirming dismissal of VRA § 2 claim against Tennessee's felon disenfranchisement law on this ground). At least five courts of appeals have held that evidence of statistical disparities alone is insufficient as a matter of law to establish a VRA § 2 claim of vote denial on account of race. *See Smith v. Salt River Project Agricultural Improvement and Power District*, 109 F.3d 586, 588-589, 595-596 (9th Cir. 1997) (rule that only land owners could vote in agricultural and power district elections held not to violate VRA, despite showing that a smaller percentage of African-American residents own land compared to whites); *Ortiz v. City of Philadelphia Office of the City Comm'rs*, 28 F.3d 306, 307-15 (3d

Cir. 1994) (state law that purged from voter lists any person who did not vote in two preceding years did not violate VRA, even though law had disproportionate impact on minority voters because more minority members than whites were inactive voters); *Salas v. Southwest Texas Junior Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) (at-large district to elect college board members held not to violate VRA, despite showing of statistically significantly lower turnout by Hispanic voters); *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352, 1358-59 (4th Cir. 1989) (appointive school boards held not to violate VRA, despite statistical disparity between percentage of African-Americans appointed to boards compared to percentage in population); *Wesley*, 791 F.2d at 1260-1262 (allegation that Tennessee felon disenfranchisement law had disproportionate impact on African-Americans failed to state VRA claim).

"These cases stand for the principle that a bare statistical showing of disproportionate impact on a racial minority does not satisfy the § 2 'results' inquiry.' " *Salt River*, 109 F.3d at 595. Instead, "there must be some causal connection between the challenged electoral practice and the alleged [racial] discrimination that results in a denial or abridgement of the right to vote." *Ortiz*, 28 F.3d at 310. The requirement of such a causal connection follows from the language in VRA § 2 prohibiting a vote denial or dilution "on account of race or color." See *Johnson*, 405 F.3d at 1238 & n.7 (Tjoflat, J., concurring); *Salt River*, 108 F.3d at 595 n.7; *Wesley*, 791 F.2d at 1260-1261. "The mere fact that many incarcerated felons happen to be black and latino is insufficient grounds to implicate ... the Voting Rights Act." *Jones v. Edgar*, 3 F.Supp.2d 979, 981 (C.D. Ill.

1998) (dismissing VRA claim against Illinois felon disenfranchisement law on this ground); *accord Farrakhan*, 359 F.3d at 1117-1119 (Kozinski, J.) (arguing for dismissal of VRA claim against Washington law on this ground).

Nor did Petitioners allege any factual support for the further, conclusory assertion that there is a causal connection between any alleged "racial and ethnic bias ... in the Massachusetts court system" and the disqualification of incarcerated felons from voting. Pet. App. 7a.

> The most plaintiffs have suggested is that despite the self-evident racial neutrality of depriving all incarcerated felons from voting while imprisoned, there may be some causal connection between being incarcerated for felonies and their race. But the very 1994 Commission Report on which they rely concludes that no such connection was shown ... [and that] the data simply did not exist to permit the testing of the hypothesis. ... There is nothing else.

Pet. App. 39a-40a n.23. Such conclusory allegations of causation are insufficient to state a claim. *Dura Pharmaceuticals v. Broudo*, 544 U.S. 336, 347 (2005) (applying Rule 8(a)(2) pleading requirements to "causal connection" element of securities fraud claim).

Because Petitioners failed to allege facts plausibly suggesting that the Massachusetts felon disenfranchisement laws violate VRA § 2, this is not an appropriate case to review the first question.

C. The Decision Below Is Consistent with the Rules for Construing Laws Enacted Under Congress's Enforcement Powers.

Although this Court has not addressed whether VRA § 2 applies to state laws that disqualify felons from voting, the court of appeals' decision that it does not apply in the circumstances of this case is consistent with well-established rules of construction that weigh heavily in favor of the result reached by the First Circuit. Congress may only exercise its enforcement powers under the Fourteenth or Fifteenth Amendment to limit States' authority to disenfranchise incarcerated felons if Congress clearly and plainly stated its intent to do, and did so after finding there to be a pattern of unconstitutional felon disenfranchisement. Because those requirements were not met here, the court of appeals' decision was sound and no further review by this Court is needed.

The decisions by the First Circuit in this case, and by the Second and Eleventh Circuits in *Hayden* and *Johnson*, do not leave States free to disqualify criminals from voting in a deliberate attempt to disenfranchise racial minorities. If a felon disenfranchisement law were enacted with racially discriminatory intent and effect, it would violate the Equal Protection Clause. *Hunter*, 471 U.S. at 227-28, 233. There was no need for Congress to exercise its enforcement powers under the Fifteenth Amendment to prevent the passage of felon disenfranchisement laws motivated by racial animus, "as these laws are already unconstitutional under the Fourteenth Amendment." *Hayden*, 449 F.3d at 316 n.11. Furthermore, such laws would also seem to violate the Fifteenth Amendment ban on

state laws that deny the right to vote "on account of race, color, or previous condition of servitude." *Cf. United States v. Mississippi*, 380 U.S. 128 (1965) (United States Attorney General could challenge state literacy test and "good moral character" test for voting registration on ground that Mississippi adopted these laws with intent to deny right to vote on account of race or color and thus violated the Fifteenth Amendment). The Fifteenth Amendment "is self-executing." *See National Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 350 (1973).

Thus, although construing the VRA not to apply to felon disenfranchisement laws means that in this respect the statute is narrower in scope than the Reconstruction Amendments themselves, this construction in no way undermines the constitutional prohibitions against States adopting laws to disqualify felons from voting with racially discriminatory intent or purpose. In this case, Petitioners did not allege that the Massachusetts laws were the result of deliberate racial animus. Pet. App. 2a, 9a.

1. The Clear Statement Rule.

The court of appeals' holding that VRA § 2 must be construed not to apply in the circumstances of this case is consistent with this Court's precedent regarding the "clear statement" or "plain statement" rule. *Hayden*, 449 F.3d at 323-328; *Johnson*, 405 F.3d at 1232 & n. 35. The text of 42 U.S.C. § 1973 provides no clear indication that Congress intended to shift the constitutional balance by limiting the

power of States acting without racial animus to disenfranchise felons.

"When 'Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.'" *Raygor v. Regents of University of Minnesota*, 534 U.S. 533, 543 (2002) (quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989)). "This principle applies when Congress 'intends to pre-empt the historic powers of the States' or when it legislates in 'traditionally sensitive areas' that 'affec[t] the federal balance.'" *Raygor*, 534 U.S. at 543-544 (quoting *Will*, 491 U.S. at 65).

The clear statement rule applies with full force when Congress acts pursuant to its enforcement powers under the Reconstruction Amendments. *Gregory v. Ashcroft*, 501 U.S. 452, 457-64, 467-70 (1991) (holding that "plain statement" rule requires that ambiguous provision of the Age Discrimination in Employment Act, a statute enacted under § 5 of the Fourteenth Amendment, may not be construed to limit States' power to decide qualifications of judges); *see also Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 726 (2003) (requiring clear statement of intent to use enforcement power under § 5 of the Fourteenth Amendment to abrogate sovereign immunity granted by Eleventh Amendment).

There is no merit to Petitioners' suggestion that, because the Court did not discuss the clear statement rule when applying VRA § 2 to a vote dilution claim in *Chisom v. Roemer*, 501 U.S. 380 (1991), that opinion constitutes "clear Supreme

Court authority that the plain statement rule does not apply when determining coverage under § 2 of the Voting Rights Act." Pet. 19 n.6 (quoting *Baker v. Pataki*, 85 F.3d 919, 938 (2nd Cir. 1996) (Feinberg, J., for five of ten judges) (because the court was evenly divided in *Baker*, their opinions were without precedential effect; *see id.* at 921, n.2.). "[T]he unexplained silences of [the Court's] decisions lack precedential weight." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995); *accord, e.g., United States v. Shabani*, 513 U.S. 10, 16 (1994) (questions that "merely lurk in the record" have not been resolved (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925))).

a. Section 2 of the Voting Rights Act Is Ambiguous.

"As a matter of textual analysis, it is neither plain nor clear that" VRA § 2 applies to felon disenfranchisement laws. Pet. App. 23a. "[A]s it exists today," VRA § 2(a) "forbids any 'standard, practice, or procedure' that 'results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.'" *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504, 2509 (2009) ("*NAMUDNO*") (quoting 42 U.S.C. § 1973(a)). In addition, VRA § 2(b) "make[s] clear that an application of the results test requires an inquiry into 'the totality of the circumstances.'" *Chisom*, 501 U.S. at 394 (construing 42 U.S.C. § 1973(b)). Although the requirements of the clear statement rule would be "amply met" if the Voting Rights Act's "language unmistakeably include[d]" felon disenfranchisement

laws, *see Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998), that is not the case.

The only part of VRA § 2 that Petitioners claim to be unambiguous is the phrase "voting qualification" in § 2(a). Pet. 15-16. Petitioners contend that, because Massachusetts law disqualifies incarcerated felons from voting, those laws must be subject to VRA § 2. *Id.* Only the first half of this contention is correct. As Petitioners noted below, to characterize the Massachusetts felon disenfranchisement laws "as anything other than a 'voting qualification' is to throw the concept of plain meaning out the window." Petitioners' C.A. Principal and Response Brief 18. This is why the court of appeals was right to affirm dismissal of Petitioners' claim under the Ex Post Facto clause. *See* pages 31-35, below. But VRA § 2(a) only bars a voting qualification that "results in a denial or abridgement of the right ... to vote on account of race or color." 42 U.S.C. § 1973(a). Petitioners' truncated analysis of the language of VRA § 2 is flawed, and fails to address the ambiguity in the phrase "on account of race or color."

The language of VRA § 2(a) "is both broad and ambiguous." Pet. App. 23a. "Congress's decision to retain the phrase 'on account of race or color' makes it unclear as to whether Section 2 would apply to [a State's] felon disenfranchisement provision[s], which ... appl[y] to felons without regard to race or color." *Johnson*, 405 F.3d at 1229 n.30. As the Court has observed in other contexts, "the phrase 'on account of' does not unambiguously define itself," and is susceptible of different, plausible meanings. *O'Gilvie v. United States*, 519 U.S. 79, 82 (1996) (construing Internal Revenue Code); *accord Bank of*

Am. Nat'l Trust & Savings Assoc. v. 203 North LaSalle St. Partnership, 526 U.S. 434, 449-54 (1999) (construing Bankruptcy Code).

Furthermore, the "totality of the circumstances" test in VRA § 2(b) "is exceptionally vague. [The statutory language provides] almost no guidance as to what illegally lessens the opportunity to vote." *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 500 (2nd Cir. 1999) (Leval, J., concurring); *accord Smith v. Boyle*, 144 F.3d 1060, 1063 (7th Cir. 1988) (§ 2(b) is a "notably vague standard"); *see also League of United Latin American Citizens v. Perry*, 548 U.S. 399, 426 (2006) ("The general terms of the statutory standard 'totality of circumstances' require judicial interpretation."). Since VRA § 2(a) cannot be construed in isolation from § 2(b), *see Chisom*, 501 U.S. at 394, the scope of section 2 as a whole is not at all clear from the statutory text.

b. Applying VRA § 2 Here Would Shift the Constitutional Balance.

Interpreting the VRA to apply in the circumstances of this case, *i.e.* to limit felon disenfranchisement laws that were *not* adopted with racially discriminatory intent, would alter the existing constitutional balance of power between the federal government and the States, and thus the clear statement rule applies. *See Hayden*, 449 F.3d at 326-328; *Johnson*, 405 F.3d at 1232 & n. 35. There is no merit to Petitioners' surprising assertion that the clear statement rule does not apply in the voting rights context because "[t]he very purpose of the Fifteenth Amendment ... was to strip the [S]tates

of their power to regulate voting" and give that power instead to Congress. Pet. 19 n.6.

"No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices." *NAMUDNO*, 129 S.Ct. at 2519 (Thomas, J., concurring in part and dissenting in part) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970) (Black, J., announcing the judgment of the Court)). "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . lies at 'the heart of representative government.' " *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)). "It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States 'guarantee[s] to every State in this Union a Republican Form of Government.' " *Id.* (quoting U.S. Const., Art. IV, § 4).

The Court has long upheld States' authority to prescribe reasonable voter qualifications that included disenfranchisement for conviction of particular crimes. *See, e.g., Romer v. Evans*, 517 U.S. 620, 634 (1996) (precedent that States may disenfranchise convicted felons is "unexceptionable"); *Lassiter v. Northampton Elec. Bd.*, 360 U.S. 45, 51 (1959) (like residence and age, "criminal record" is an "obvious" factor that "a State may take into consideration in determining the qualifications of

voters"); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("[m]inors, felons, and other classes may be excluded" from voting).

There is no merit to Petitioners' assertion that the Reconstruction Amendments already bar all "racially discriminatory felon disenfranchisement laws," and that therefore applying VRA § 2 on the facts of this case would not alter the constitutional balance. Pet. 18 n.6. The notion that the Fourteenth or Fifteenth Amendment would bar the Massachusetts felon disenfranchisement laws even if VRA § 2 did not is false. Since Petitioners make no claim that the challenged Massachusetts laws were adopted with racially discriminatory intent, but allege merely that they result in a racially disproportionate impact, those laws are constitutionally permissible regulations of voting qualifications.

"The power of the states to disqualify from voting those convicted of crimes is explicitly set forth in § 2 of the Fourteenth Amendment." Pet. App. 15a. The States' "exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment," and thus as a general matter felon disenfranchisement laws do not violate equal protection. *Richardson*, 418 U.S. at 54-56. Indeed, the Equal Protection Clause even allows States to enforce a felon disenfranchisement law "that produces disproportionate effects along racial lines," unless the law was adopted with "racially discriminatory intent or purpose." *Hunter*, 471 U.S. at 227-28, 233. Similarly, "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *Bolden*, 446 U.S. at 62.

Thus, applying the VRA to the circumstances of this case would necessarily alter the constitutional balance.

c. Congress Provided No Clear Statement That the Voting Rights Act Was Intended to Restrict the Power of States to Disenfranchise Felons.

Since the VRA contains no express mention of felon disenfranchisement laws, and indeed the legislative history reflects an intent that the VRA not apply in these circumstances, "Congress unquestionably did not manifest an 'unmistakably clear' intent to include felon disenfranchisement laws under the VRA." *Hayden*, 449 F.3d at 328 (quoting *Gregory*, 501 U.S. at 460).

The legislative history indicates that Congress intended that: (1) the 1982 amendment to VRA § 2 be construed consistently with very similar language appearing in the 1965 version of VRA § 4; and (2) this language, as first appearing in the 1965 version of VRA § 4, does not encompass state laws that disqualify felons from voting. *See* S. Rep. No. 97-417, at 27-28, n.109 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205-6 n.109 (discussing meaning of the "results test" established by revised VRA § 2, and noting that "[t]he same use of 'on account of race or color' is made in a different context in Section 4(a)"); S. Rep. No. 89-162, at 24 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2562 (stating that VRA § 4 "would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be

free of conviction of a felony or mental disability"); H. Rep. No. 89-439, at 25-26 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2457 (similarly stating that VRA § 4 would not "proscribe a requirement of a State or any political subdivision of a State that an applicant for voting or registration for voting be free of conviction of a felony or mental disability").

"[C]onsidering the prevalence of felon disenfranchisement [provisions] in every region of the country since the Founding, it seems unfathomable that Congress would silently amend the Voting Rights Act [in 1982] in a way that would affect them." *Hayden*, 449 F.3d at 317 (quoting *Johnson*, 405 F.3d at 1234). The explicit constitutional reservation of state power to disenfranchise felons protects a "practice . . . of ancient origin" that has always been followed by the vast majority of States. *Hayden*, 449 F.3d at 316-317. For example, when the Fourteenth Amendment was ratified in 1868, 29 of the 36 States "had provisions in their constitutions [that] prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes." *Richardson*, 418 U.S. at 48. "Today, likewise, every state except Maine and Vermont disenfranchises felons." *Hayden*, 449 F.3d at 317. "[I]t is unlikely that Congress would have invalidated such laws—which have been widely-used since the origins of the Republic—without any discussion of the matter." *Id.* at 317 n.13.

In sum, because the result reached by the court of appeals was required by the clear statement rule, certiorari review of Petitioners' VRA claim is not warranted.

2. The Canon of Constitutional Avoidance Applies Because Congress Made No Findings of a Pattern of Unconstitutional Felon Disenfranchisement.

The court of appeals' holding is also consistent with the rule that an ambiguous statute should be interpreted in a manner that will avoid constitutional doubt. The text of VRA § 2 is ambiguous and can reasonably be construed not to apply to state laws that disenfranchise individuals on account of their being an incarcerated felon. Pet. App. 23a; *see also* pages 19-21 above. Because Congress never identified any history or pattern of States unconstitutionally disenfranchising felons, it would raise grave constitutional problems to construe VRA § 2 as applying to felon disenfranchisement laws that were adopted with no racially discriminatory intent. *Hayden*, 449 F.3d at 331, 334-36 (Walker, J., concurring); *Johnson*, 405 F.3d at 1231-32; *Farrakhan*, 359 F.3d at 1121-1125 (Kozinski, J., et al., dissenting from denial of *en banc* review).

The First Circuit noted that by ruling as it did it had "no need to reach the serious constitutional questions which the Commonwealth argues would be raised were we to adopt [Petitioners'] construction of the statute." Pet. App. 41a. Where, as here, "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware &*

Hudson Co., 213 U.S. 366, 408 (1909)). This canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). This canon applies when construing the Voting Rights Act. *See Miller v. Johnson*, 515 U.S. 900, 926-27 (1995).

The constitutional problem that would arise from applying the VRA § 2 to felon disenfranchisement laws is the lack of Congressional findings that such laws have been used to disenfranchise voters on account of race. "[P]rophylactic legislation designed to enforce the Reconstruction Amendments must 'identify conduct transgressing the ... substantive provisions' it seeks to enforce and be tailored 'to remedying or preventing such conduct.'" *NAMUDNO*, 129 S.Ct. at 2524-25 (quoting *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999)). "Congress must establish a 'history and pattern' of constitutional violations to establish the need for" provisions in the Voting Rights Act or any other legislation "that pushes the limits of its constitutional authority" to enforce the Fourteenth or Fifteenth Amendment. *Id.* at 2525 (quoting *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001)).[3] Thus, "as broad as the congressional

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[3] Congress may not be required to make such findings in cases "where the targeted constitutional wrong is self-evident." *Laro v. New Hampshire*, 259 F.3d 1, 8 n.4 (1st Cir. 2001). But this is not such a case. Petitioners do not allege that the Massachusetts felon disenfranchisement laws were adopted

enforcement power is, it is not unlimited." *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (quoting *Oregon v. Mitchell*, 400 U.S. at 128 (Black, J., announcing the judgment of the Court)).

The Court struck down the portion of the 1970 amendment to the VRA that required States to lower their minimum voting age to 18 years for state and local elections, on the ground that this provision exceeded congressional Reconstruction Amendment enforcement powers because "Congress made no legislative findings that 21 year old requirement was used by the States to disenfranchise voters on account of race." *Mitchell*, 400 U.S. at 130-32 (Black, J.); *accord id.* at 212-13 (Harlan, J., concurring in judgment); *id.* at 295-96 (Stewart, J., joined by Burger, C. J., and Blackman, J., concurring in judgment). "Securing the right to vote for 18-year-olds required passage of the Twenty-Sixth Amendment in 1971." *Farrakhan*, 359 F.3d at 1122 (Kozinski, J.).

Given the holding in *Mitchell*, it would be highly problematic at best to construe the current VRA § 2 as applying to state laws that disqualify voters younger than the age of 18. One could imagine a lawsuit in which a plaintiff alleged that a state law disqualifying 17 year olds from voting has a "disproportionately adverse effect on the voting rights of African-Americans and Hispanic Americans compared to its effect on the voting rights of other citizens," just as Petitioners claimed here regarding

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with an intent to deny or abridge the right to vote on the basis of race, "or of any history by Massachusetts of intentional discrimination against minority voters." Pet. App. 2a; *see also id.* 9a, 17a, 26a.

the Massachusetts felon disenfranchisement laws. Pet. App. 7a. But it would surely be inconsistent with the holding in *Mitchell* to construe VRA § 2 as encompassing such a claim. If Congress cannot explicitly regulate minimum age requirements for voting in State elections without first finding that such rules have been used to disenfranchise voters on account of race, as the Court held in *Mitchell*, then Congress cannot do so implicitly through the 1982 amendment to VRA § 2. Nor would it do violence to the plain language of the statute to construe VRA § 2 as not applying to State laws that disqualify persons younger than 18 years of age from voting. Although such laws establish age as a "voting qualification or prerequisite to voting," they do not do so "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973.

The same is true here. "As was the case in *Mitchell*, when Congress enacted the VRA and its subsequent amendments, there was a complete absence of congressional findings that felon disenfranchisement laws were used to discriminate against minority voters." *Johnson*, 405 F.3d at 1231. "Because the application of the VRA to felon-disenfranchisement statutes would not be a response to specific, identified, unconstitutional wrongdoing, it cannot be congruent and proportional," and thus would exceed Congress's powers under the Fourteenth and Fifteenth Amendments. *Hayden*, 449 F.3d at 335-36 (Walker, J., concurring).

Plaintiffs' only nod to *Oregon v. Mitchell* is to quote Justice Stewart's observation that Congress

was not required to find that "literacy tests unfairly discriminate against Negroes in every State in the Union" before barring literacy tests nationwide. Pet. 27 (quoting *Mitchell*, 400 U.S. at 284 (Stewart, J., concurring in part and dissenting in part)). But this statement in no way supports' Petitioners' suggestion that Congress could ban either literacy tests or felon disenfranchisement laws without making "an express Congressional finding of past racial discrimination." Pet. 27. To the contrary, Justice Stewart's point was that the 1965 Congress had made specific findings that literacy tests had been used in multiple States to engage in a pattern of unconstitutional denial of the right to vote based on race, and that those findings "would have supported a nationwide ban on literacy tests." *Mitchell*, 400 U.S. at 284. Similarly, Justice Black explained that the reason why Congress could ban literacy tests in 1970 was that it made "a finding ... that literacy tests have been used to discriminate against voters on account of their color," based on evidence of "a long history of the discriminatory use of literacy tests to disfranchise voters on account of their race." *Id.*, 400 U.S. at 117, 132 (Black, J., announcing the judgment of the Court).

"There is, quite simply, no evidence in the record before Congress of a history and pattern of invidious felon disenfranchisement by the states." *Hayden*, 449 F.3d at 331 (Walker, J., concurring). Thus, "no basis exists to conclude that felon-disenfranchisement statutes ... are part of the history and pattern of unconstitutional discrimination that the VRA was targeting." *Id.* at 334. In the absence of such findings, Congress lacked the power under the Reconstruction

Amendments to revise the VRA to apply to felon disenfranchisement laws that were not adopted with discriminatory intent and that would thus pass muster under the Fourteenth and the Fifteenth Amendments.

In sum, because the result reached by the court of appeals was also required by the need to construe VRA § 2 so as to avoid constitutional doubt, certiorari review of Petitioners' VRA claim is not warranted.

II. No Review of the Ex Post Facto Claim Is Warranted.

Petitioners' claim under the Ex Post Facto Clause also does not merit certiorari review. The court of appeals properly stated and applied the correct legal standard in deciding this claim. Pet. App. 42a-48a. Petitioners disagree with inferences drawn by the First Circuit from the undisputed material facts, but do not identify any unresolved and important federal question that warrants certiorari review. Pet. 29-30.

The court of appeals correctly held that "[o]nly a punitive measure can violate the Ex Post Facto Clause," Pet. App. 43a (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)), and that, where a legislative body intended to enact a civil regulatory scheme, "courts must further inquire whether "the statutory scheme was so punitive either in purpose or effect as to negate that intention," Pet. App. 45a (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)). The court also correctly applied the well-established rule that " 'only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,"

id. (quoting *Hudson v. United States*, 522 U.S. 93, 100 (1997), quoting in turn *Ward*, 448 U.S. at 249); *accord Smith*, 538 U.S. at 92. Finally, the court of appeals correctly held that allegations of punitive purpose or effect should be determined by applying "the non-exclusive factors test" set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963). Pet. App. 46a (citing *Smith*, 538 U.S. at 97).

Petitioners argue that the middle step, regarding application of the "clearest proof" standard, broke new ground and warrants certiorari review. Pet. 11, 28-31. They mistakenly assert that: (i) the Court has never determined whether "the 'clearest proof' standard" for assessing punitive purpose or effect applies "in the absence of a plain statement by the legislature of civil regulatory intent...," Pet. 11; (2) has only applied that standard where "a legislative body has stated its intention to enact a civil regulatory scheme," Pet. 28; and (3) should grant certiorari review to decide whether the same standard applies where such legislative intent can be inferred but was not "clearly-stated," Pet. 30. Petitioners misrepresent this Court's holdings.

In fact, the Court has repeatedly held that the "clearest proof" standard for overriding legislative intent that a measure be civil in nature applies whether that intent is stated expressly or is implied by the text, context, and structure of the enactment. *Smith*, 538 U.S. at 93 ("The courts 'must first ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly *or impliedly* a preference for one label or the other.'" (emphasis added, quoting *Hudson*, 522 U.S. at 99)) (describing standard for determining whether

enactment is civil or punitive for purposes of applying Ex Post Facto Clause); *accord United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984) (same when applying Double Jeopardy Clause); *Ward*, 448 U.S. at 248 (same when applying Fifth Amendment's guarantee against compulsory self-incrimination). "Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' We consider the statute's text and its structure to determine the legislative objective." *Smith*, 538 U.S. at 92 (citations omitted) (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)).

The Court has already determined that, in addition to the statutory language, "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent" to pass a regulatory rather than a punitive measure *Smith*, 538 U.S. at 94; *accord Hendricks*, 521 U.S. at 361 (State's "objective to create a civil proceeding is evidenced by its placement of the Act within the [State's] probate code, instead of the criminal code" (citations omitted)).

Consistent with *Smith* and *Hendricks*, the court of appeals held that the intent that the Massachusetts felon disenfranchisement laws be part of "a civil regulatory scheme" is demonstrated by the undisputed facts that those laws are part of "its civil constitutional and statutory voter qualification provisions" and are "enforced civilly, not criminally." Pet. App. 44a-45a.

Although Petitioners disagree with the inferences that the court of appeals drew from these undisputed facts, that disagreement does not warrant review by this Court. Petitioners note that the Acting Governor stated at a press conference that "[p]rison is supposed to mean punishment, not some opportunity to form a political group," when he proposed a constitutional amendment to disenfranchise *all* persons incarcerated on account of a criminal conviction, including misdemeanants as well as felons. Pet. 6-7. That proposal "was never in fact acted on by the legislature." Pet. App. 42a; *see also id.* 4a. Petitioners nonetheless argue that statements by the Acting Governor are "a clear manifestation of punitive intent" that "should have marked the end of the First Circuit's inquiry." Pet. 30. The court of appeals disagreed, finding that the information provided to voters regarding the proposed constitutional amendment to disenfranchise incarcerated felons "made no mention of any goal of punishing prisoners." Pet. App. 45a; *see also id.* 4a, 48a. The court of appeals was not required to find that "isolated statements" by the Acting Governor, or by individual legislators, demonstrated that the voters acted with punitive intent. *Cf. Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 855 n.15 (1984) ("several isolated statements" by legislators held insufficient to establish that Congress had "punitive intent").

Finally, Petitioners say that they "take issue with" the court of appeals' "analysis of the *Mendoza-Martinez* factors," Pet. 30 n.7, but do not suggest that the First Circuit's application of those factors to the particular facts of this case warrants certiorari

review. The court of appeals' application of those factors was thoughtful and, as the First Circuit made clear, consistent with this Court's prior decisions. *See* Pet. App. 46a-48a.

In sum, Petitioners have not identified any unresolved question of federal law raised by their ex post facto claim that would warrant certiorari review. Petitioners may disagree with the dismissal of their ex post facto claim, but that disagreement is based on nothing more than an assertion that the court of appeals misapplied a well-settled rule of law. It would not be appropriate to grant certiorari to review the court of appeals' application "of a properly stated rule of law" to the facts of this particular case. *See* Sup. Ct. R. 10; *accord United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant certiorari to review evidence and discuss specific facts.").

Conclusion.

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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